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**CALIFORNIA DEPARTMENT OF WATER
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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

**HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
FIX**

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION TO
STRIKE SUR-REBUTTAL CROSS-
EXAMINATION AND OBJECTION TO
ENTRY INTO THE RECORD OR
ADMISSION INTO EVIDENCE**

California Department of Water Resources ("DWR") requests that the Hearing Officers strike both the cross-examination questions asked by Osha Meserve¹ and Kelly Taber² on June 15, 2017 and the testimony provided in response by Parviz Nader-Tehrani regarding habitat restoration acreage that are not part of the California WaterFix project, Alternative 4A identified in the 2015 RDIER/SDEIS and 2016 Final EIR/s. Furthermore, DWR objects to exhibits used during this cross-examination being entered into the record or admitted as evidence.³ The cross-examination questions and associated exhibits are beyond the scope of the notice provided for this hearing, are irrelevant as to the questions before the board, and are beyond the proper scope of sur-rebuttal cross-examination as they are not related to Dr. Nader-Tehrani's sur-rebuttal testimony.

¹ Meserve cross-examination: Rough Transcript pp. 220:4-221:5; 223:8-224:22; 225:25-226:14.

² Taber cross-examination: Rough Transcript pp. 234:1-241:11.

³ LAND-113, LAND-116; STKN-41; STKN-43; STKN-44.

1 **I. STATEMENT OF FACTS**

2 DWR's and the U.S. Bureau of Reclamation's (Petitioners) August 26, 2015 petition
3 states an intent to add points of diversion and redirection identified by, and limited to,
4 Alternative 4A (California WaterFix) of the Bay Delta Conservation Plan/California
5 WaterFix Partially Recirculated Supplemental Draft Environmental Impact Report /
6 Supplemental Draft Environmental Impact Statement ("RDEIR/SDEIS"). (August 26,
7 2015 Petition, at PDF p. 6.) During the course of the hearing Petitioners have also
8 completed a Final Environmental Impact Report/Environmental Impact Statement
9 ("FEIR/EIS") that has been listed as staff exhibit SWRCB-102. California EcoRestore is
10 an entirely separate project from Alternative 4A. (SWRCB-102, at pp. 5-3 to 5-4.). Other
11 external habitat restoration efforts are also entirely separate projects from Alternative 4A.
12 The notice issued for commencement of this hearing identifies the limits of the matter
13 before the Hearing Officers. The project at issue is not inclusive of any project other
14 than Alternative 4A.⁴

15 At no time in this hearing have Petitioners submitted evidence indicating that the
16 petitioned project includes habitat restoration beyond any identified directly within
17 Alternative 4A. At no time in this hearing have other parties presented evidence alleging
18 that Alternative 4A was modified to include restoration beyond any identified directly
19 within Alternative 4A. In his sur-rebuttal testimony, Dr. Nader-Tehrani states that Dr.
20 Paulsen's testimony in Stockton-26 and Antioch-302 is wrong because the alternatives
21 she cites for water quality analysis purposes assumed 65,000 acres of habitat
22 restoration (DWR-932, at 7:4-7:23), which is not included within Alternative 4A nor
23 identified as a component of Alternative 4A.⁵ If the Hearing Officers noticed a theme

24

25 ⁴ October 30, 2015 Notice of the Petition, p.4.

26 ⁵ Should the Hearing Officers be interested in the habitat included within Alternative 4A, it is set
27 forth in a table found in the FEIR/EIS chapter 3 on pages 3-54 through 3-57. The introduction of
28 Alternative 4A and its habitat commitments were initially set forth in the RDEIR/SDEIS in Section 4,
 specifically 4.1-15. These details were released in 2015 and could easily have been a proper component
 of the City of Stockton's or LAND's cases-in-chief. There is no equitable reason why this issue falls
 outside of the rules set forth in the Hearing Notice or the Rulings.

1 here, it is because Petitioners have consistently constrained the characterization of
2 habitat restoration within the petitioned project. Yet, it is upon Dr. Nader-Tehrani's
3 statement that Alternative 4A does not include 65,000 acres of habitat restoration that
4 both Ms. Meserve and Ms. Taber based their line of questioning regarding habitat
5 restoration of projects other than that being considered by the Hearing Officers in this
6 proceeding.⁶

7 The Hearing Officers' October 30, 2015 Notice of the Petition indicates the topics
8 are relevant in this hearing. As indicated by the list of key issues in that notice, the
9 matter before the Hearing Officers is limited to the "changes proposed in the Petition."
10 (October 30, 2015 Notice of the Petition, p.11). The Petitioned Project is also correctly
11 identified in this notice as, "Alternative 4A, the CEQA preferred alternative." (*Id*, p.4)

12 On October 7, 2016 the Hearing Officers ruled that the adequacy of the
13 environmental document is beyond the scope of this hearing. (October 7, 2016 Ruling,
14 p.3)

15 The Hearing Officers' April 13, 2017 ruling indicates cross-examination of sur-
16 rebuttal witnesses will be limited to the scope of their sur-rebuttal. (April 13, 2017 Ruling,
17 p.5)

18 **II. ARGUMENT**

19 The basis of the entire objectionable line of questioning purportedly arises from the
20 sur-rebuttal testimony of Dr. Nader-Tehrani beginning on page 7. (DWR-932.) There he
21 states that Dr. Paulsen fails to rely upon the correct analysis contained in the FEIR/EIS
22 for her testimony.

23 In Stockton Exhibit 26, Page 29 through 32 Dr. Paulsen cites results
24 from FEIR/EIS for a number of Alternatives including Alternatives 1A, 18,
25 1 C, 2A, 28, 2C, 3,4,5,6A, 68, 6c, 7 ,8,9, 4A, 20, and 5A. Specifically on
26 Page 31, Dr. Paulsen states:

27 DWR found that Alternatives 1A, 1B, 1C, 2A, 2B, 2C, 3, 4, 5, 6A,
28 6B, 6C, 7, 8, and 9 would have significant adverse impacts with
respect to chloride concentrations at the Contra Costa Pumping
Plant # 1 (FEIR/EIS Figure 8-0a) Only Alternatives 4A, 2D, and 5A

⁶ Rough Transcript pp. 218:24-219:4; 229:14-230:4; 230:24-231:5; 234:1-13; 234:20-235:5.

1 were found to have no significant impact/no adverse effects
2 (FEIR/EIS Figure 8-0a). Thus, operation of the Project to
3 Boundaries 1 and 2, which DWR states are represented by
4 scenarios 1 A, 3, and 8, would also have significant/adverse
5 impacts

6 Similarly, in Antioch 302 page 43, Dr. Paulsen cites FEIRS Appendix
7 5E, which identifies that the impacts of Boundary 1 fall within the range of
8 impacts for Alternative 1 A and 3. In both exhibits referenced *above* she
9 goes on to point out that Boundary 1 should also have the same impact as
10 Alternative 1A and 3. However, **Dr. Paulsen does not provide a**
11 **complete summary of the information presented in the FEIRS**
12 **Appendix 5E** as to why the impact conclusion for salinity is less than
13 significant unlike Alternative 1A and 3. Dr. Paulsen **fails to discuss a**
14 **very important and pertinent point contained within the information**
15 **she reviewed** that all alternatives she cites, except for Alternatives 4A,
16 and 5A, were assumed to include 65,000 acres of restoration.
17 Furthermore, all these alternatives, except for Alternatives 4A, 20, and 5A,
18 were simulated at LL T (Late Long Term, 2060 climate change and 45 cm
19 of sea level rise). Dr. Paulsen's testimony based on that analysis is wrong.

20 **The FEIR/EIS clearly explains** that the primary reason for the water
21 quality degradation (especially in Western Delta) for these alternatives
22 was the inclusion of the 65,000 acres of restoration, which was the
23 conservation measure 4 (CM4) of the BDCP (FEIRS Appendix 5E pages
24 5E-172 to 5E-173). Given that the **BDCP CM4 restoration was no longer**
25 **part of the CWF**, it is unreasonable to associate the effects of restoration
26 to the CWF Alternatives without the CM4 restoration. CWF Alternatives
27 4A, 2D and 5A were simulated at ELT (Early Long Term, 2025 climate
28 change, 15 cm sea level rise) and did not include any restoration areas.
The effect of restoration on the salinity conditions in the Delta is discussed
in detail in the DEIRS Appendix 5A and FEIRS Appendix SA, as well as In
the FEIRS Appendix 8H Attachment 1. As Dr. Paulsen indicated, none of
the three CWF alternatives 4A, 2D and 5A show any significant impacts or
adverse effects with respect to chloride concentrations at the Contra
Costa Canal. To be clear, when it comes to the incremental changes in
water quality at Contra Costa Canal due to CWF, there is no similarity
between Boundary 1 or 2 and Alternatives 1A, and 3 contrary to what Dr.
Paulsen claims. (emphasis added)

26 This testimony does not expand the scope of sur-rebuttal to projects beyond
27 the petitioned project, Alternative 4A. Instead, it quite clearly constrains the sur-
28 rebuttal to Alternative 4A in pointing out exactly where in the FEIR/EIS proper

1 Alternative 4A analysis can be found, and how to interpret that analysis given the
2 constraints of Alternative 4A.

3 **A. The Cross Exam Questions Are Beyond the Hearing Notice**

4 Petitioners set forth the petitioned project and referred to it as Alternative 4A. Dr.
5 Nader-Tehrani criticized Dr. Paulsen because she relied upon the wrong analysis
6 contained within the FEIR/EIS. As described by Dr. Nader-Tehrani in his testimony, the
7 FEIR/EIS contains the applicable analysis within FEIR/EIS Appendix 5E. Dr. Nader-
8 Tehrani did not indicate that the Petitioners were changing the petitioned project, nor
9 that any analysis beyond that assessed in the FEIR/EIS was applicable to this hearing.
10 Ms. Meserve and Ms. Taber disingenuously misstated and mischaracterized Dr. Nader-
11 Tehrani's responses to question in order to introduce, over objection, evidence that falls
12 far outside the petitioned project and beyond the analysis indicated by Dr. Nader-Tehrani
13 in any of his testimony for this hearing, but most importantly well outside information
14 presented by him in his sur-rebuttal testimony.

15 Because it is impossible for Ms. Meserve or Ms. Taber to connect the topics of their
16 cross-examination regarding habitat to the petitioned project, this cross-examination, and
17 all responses associated with their questioning, fall beyond the scope of this hearing.
18 Introduction of this evidence was in error and the materials used for and transcripts of
19 this cross-examination should be struck from the record.

20 **B. The Cross Exam Questions Are Irrelevant**

21 Because projects beyond that described in the Petition filed by Petitioners are
22 beyond the scope of this hearing, the subject matter of the cross-examination is
23 irrelevant to this hearing. The material has no probative value as to the petitioned
24 project because it has no relation to the analysis conducted for, or testimony prepared
25 for, this hearing for the simple reason that projects beyond the petitioned project are
26 independent, do not alter the project specific analysis, and are not before the hearing
27 officers in this hearing.

1 In response to objections lodged on Ms. Taber's cross-examination, Ms. Meserve
2 responded by attacking the adequacy of the environmental document. This is not a
3 legitimate basis to bring in this cross-examination. As identified by the Hearing Officers,
4 the adequacy of the environmental documents is not an issue in this hearing. (See
5 October 7, 2016 Ruling at p.3.)

6 **C. The Cross Exam Questions Are Beyond the Proper Scope of Sur-**
7 **Rebuttal**

8 Dr. Nader-Tehrani addressed mistakes made by Dr. Paulsen and indicated
9 specifically the correct information contained within the FEIR/EIS. This was the extent of
10 his sur-rebuttal testimony. Despite statements by Ms. Meserve and Ms. Taber that
11 somehow this allows them to question the project description, the ability to investigate
12 anything beyond the comparison of water quality analysis contained in Alternative 1, as
13 relied upon by Dr. Paulsen, and the analysis contained in Appendix 5E is beyond the
14 scope of Dr. Nader-Tehrani's sur-rebuttal testimony. Sur-rebuttal is not the Petitioners'
15 case-in-chief and, despite statements to that effect by Ms. Meserve and Ms. Taber, it is
16 not appropriate to allow its narrow focus to be hijacked in order to allow City of Stockton
17 and LAND to revisit points from the case-in-chief that they feel they forgot to address at
18 the appropriate time, i.e. during cross-examination of Dr. Nader-Tehrani upon
19 presentation of his case-in-chief direct testimony.

20 The Hearing Officers indicated that cross-examination of sur-rebuttal is limited to
21 the substance of the sur-rebuttal. (See April 13, 2017 Ruling at p.5.) This was
22 disregarded when cross-examination was allowed to stray into alternative habitat
23 restoration scenarios proposed by other projects. Indeed, it is a continuing pattern of
24 behavior by opposing counsel to lift out of context a word or phrase in order to pull into
25 this hearing material that are clearly beyond the scope.

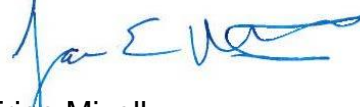
26 Dr. Nader-Tehrani did not address in his written sur-rebuttal testimony points raised
27 by Ms. Meserve and Ms. Taber. Thus, the questions and resulting testimony, as well as
28 any exhibits introduced during that cross-examination, should be struck from the record.

1 **III. CONCLUSION**

2 Ms. Meserve's and Ms. Taber's cross-examination questions improper for all the
3 reasons stated in this motion and objection. DWR requests that the Hearing Officers
4 strike these improper cross-examination questions and Dr. Nader-Tehrani's answers to
5 those questions (Meserve cross: p.220:4-221:5; p.223:8-224:22; p.225:25-226:14;
6 Taber cross: p.234:1-241-11.), and sustain DWR's objection to entry of the cross-
7 examination exhibits into the record and admission into evidence. (LAND-113, LAND-
8 116; STKN-41; STKN-43; STKN-44.)

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10 Dated: June 19, 2017

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